FILE COPY

Office-Supreme Court, U.S.
FILED
DEC 20 1960
JAMES R. BROWNING, Clerk

Supreme Court of the United States.

OCTOBER TERM, 1960

No. 593

JAMES E. McDANIEL,

Petitioner,

against

M S LISHOLT, her engines, etc, and A. S. LISE, her owner,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

STANDARD, WEISBERG, HAROLDS & MALAMENT,
38 Park Row,
New York 38, N. Y.

MACLAY, MORGAN & WILLIAMS,
76 Beaver Street,
New York 5, N. Y.
Counsel of Record for Petitioner.

EDWARD J. MALAMENT,
Counsel for Petitioner.

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statement of Case	3
A. The Conceded Negligence of the Respondent in Causing the Fire	3
B. The Subsequent Events Leading to the Explosion	5
Reasons for Granting the Writ	9
APPENDIX:	
Fire Prevention and Fire Fighting Regulations of the United States Coast Guard for Cargo, Tankers and Passenger Vessels	1a
Opinion of United States Court of Appeals for the Second Circuit	6a
Judgment	11a

Table of Cases Cited

Arizona, The, v. Anelich, 1936, 298 U. S. 110, 122-123, 56 S. Ct. 707, 80 L. Ed. 1075	10
Bandosz v. A. Dargger & Co., 1930, 255 Ill. App. 494	11, 13
Baumgartner v. United States, 1944, 322 U. S. 665, 671, 64 S. Ct. 1240	16
Beyer v. Le Fevre, 1902, 186 U. S. 114, 119, 22 S. Ct. 765	16
Cruszewski v. Isthmian Steamship Co., 3 Cir. 1947, 163 Fed. 720, 722	17

PAGE

Cameron v. Kenyon-Connell Commercial Co., 1899, 22 Mont. 312, 56 Pac. 358 ..... 11, 13

Carlock v. Westchester Lighting Co., 1935, 268 N. Y. 345, 197 N. E. 306 13

Cities Service Oil Co. v. Dixon, 1932, 14 Ohio L. Abs. 203 12

Clinkscales v. Mundoski, 1938, 183 Okla. 12, 79 Pac. 2d 562 12

Drake v. Fenton, 1912, 237 Pa. 8, 85 Atl. 14 11

Eckert v. Refiners Oil Co., 1923, 17 Ohio App. 221 ... 9

Edmond J. Moran, Inc., The, v. Harold Reinauer, The, 2 Cir. 1955, 221 F. 2d 306 11

Houston Belt & Terminal Ry. Co. v. O'Leary, Tex. Civ. App. 1911, 136 S. W. 601 11

Jenkins v. 313-321 W. 37th St. Corp., 1940, 284 N. Y. 397, 31 N. E. 2d 503 12

Kermarec v. Compagnie Generale Transatlantique, 1959, 358 U. S. 625, 630, 631, 79 S. Ct. 406, 409, 3 L. Ed. 2d 550 ..... 2, 9, 10, 16

Krauth v. Geller, 1960, 31 N. J. 270, 274, 157 Atl. 2d 129 ..... 9, 10, 11

Liming v. Illinois Cent. R. R., 1890, 81 Iowa 246, 253, 47 N. W. 66, 68 10

Lunt v. Post Printing Co., 1910, 48 Colo. 316, 110 Pac. 203 9

McAllister v. United States, 1954, 348 U. S. 19, 75 S. Ct. 6 16

McDaniel v. M/S Lisholt, S. D. N. Y. 1957, 155 F. Supp. 619, 627, 628, aff'd 2 Cir. 1958, 257 F. 2d 538, 540, 541, cert. granted and remanded, 1959, 359 U. S. 26, 79 S. Ct. 602, retried S. D. N. Y. 1959, 180 F. Supp. 24, 26, aff'd 2 Cir. 1960, 282 F. 2d 816, 817 ..... 1, 2, 9, 17

PAGE.

Max Morris, The, 1890, 137 U. S. 1, 14, 11 S. Ct. 29, 34 L. Ed. 586 10

Meiers v. Koch Brewery, 1920, 229 N. Y. 10, 127 N. E. 491 12

Offutt v. United States, 1954, 348 U. S. 11, 15, 75 S. Ct. 11 17

Parker v. Bernard, 1883, 135 Mass. 116, 119 11

Racine v. Morris, 1911, 201 N. Y. 240, 94 N. E. 864 .. 13

Roper v. United States, 4 Cir. 1960, 282 F. 2d 413, 416-417, 418 17

Ruhl v. City of Philadelphia, 1943, 364 Pa. 214, 29 Atl. 2d 784 12

Schwab v. Rubel Corporation, 1941, 286 N. Y. 525, 37 N. E. 2d 234 12

Seas Shipping Co., Inc. v. Sieracki, 1946, 328 U. S. 85, 101-102, 66 S. Ct. 872, 90 L. Ed. 1096 10

Shypulski v. Waldorf Paper Products Co., 1951, 232 Minn. 394, 45 N. W. 2d 549 12

Smith v. Twin State Gas & Electric Co., 1928, 83 N. H. 439, 448, 144 Atl. 57 12

United States v. Lubinski, 9 Cir. 1946, 153 F. 2d 1013 ..... 10, 11

United States Fidelity & Guaranty Co. v. United States, 2 Cir. 1945, 152 F. 2d 46, 48 10

Virginia, The, D. C. Md. 1920, 264 F. 986, aff'd Hines v. Butler, 4 Cir. 1921, 278 F. 877 11

Wagner v. International Ry. Co., 1921, 232 N. Y. 176, 133 N. E. 437 10

Warnken v. Moody, 5 Cir. 1927, 22 F. 2d 960 11

Wax v. Co-Operative Refinery Assn., 1951, 154 Neb. 805, 807, 49 N. W. 2d 707 9

Rules Cited

PAGE

Rule 28 U. S. C. 1254 2

Rule 28 U. S. C. 1333 2

Other Authorities Cited

New York General Municipal Law, Sec. 205-a 11, 13

Harper and James, Vol. 2, Law of Torts (1956 ed.), p. 1503, pp. 1498-1505 ..... 9, 10

Canal Zone Regulation:

Rule 8.55, 35 C. F. R. Sec. 4, 123b, Subpart E .. 13

Rule 45, 35 C. F. R. Sec. 4.47, Subpart C 13, 14

Law Reform Committee, Third Report, Cmd. No. 9305, pp. 31-32 16

Supreme Court of the United States

OCTOBER TERM, 1960

No.

JAMES E. McDANIEL,

Petitioner,

against

M S LISHOLT, her engines, etc. and A. S. LISE, her owner;

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, James E. McDaniel, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above cause on September 22, 1960.

Opinions Below

The opinion of the United States District Court for the Southern District of New York (Ryan, C. J.) reported 1959, 180 F. Supp. 24, is set forth at pages 43a-51a of the appendix to the petitioner's brief filed in the Court of Appeals.

The opinion of the United States Court of Appeals, 2 Cir., 282 F. 2d 816, is included in the appendix to this petition.

This case was previously before this Court, 359 U. S. 26, 79 S. Ct. 602, 3 L. Ed. 2d 625, and was remanded for a new trial "in light of *Kermarec* v. *Compagnie Generale Transatlantique*, 358 U. S. 625".

The opinions preceding remand are reported, S. D. N. Y. 1957, 155 F. Supp. 619; 2 Cir. 1958, 257 F. 2d 538.

Jurisdiction

The jurisdiction of this Court is based upon the provisions of 28 U. S. C. 1254 (1).

Jurisdiction in the District Court was based upon Admiralty 28 U. S. C. 1333.

Questions Presented

1. Should this Court, in the exercise of its admiralty jurisdiction, import into the general maritime law the common law rule that an occupier who negligently sets fire to his premises owes no duty to a professional fireman who is injured as a result of the fire?

2. Assuming that the general maritime law perpetuates the common law rule, does petitioner herein come within one of the recognized exceptions which permits recovery where the occupier has violated a safety statute, ordinance or governmental regulation?

3. Did the Courts below err in failing to apply the standard of reasonable care required by *Kermarec* v. *Compagnie Generale Transatlantique*, *supra*? The Court of Appeals adopted the District Court's finding that respondent's duty to take affirmative action with respect to the gas fumes in the chill box did not arise until some time after 4:30 P. M. Was this finding "clearly erroneous"?

4. (a) Was the M S Lisholt a "dead ship" at the time of petitioner's injury?

(b) Was the petitioner, as a fire watchman, engaged in work "traditionally done by seamen" at the time of his injury?

(c) Does the doctrine of unseaworthiness extend to a professional fireman who boards a fire-wracked vessel as a fire watchman and is thereafter injured as a consequence of the fire caused by the unseaworthiness of the vessel?

Statement of Case

On Feb. 6, 1954, shortly after 5:30 P. M. an explosion occurred aboard the M S Lisholt (45a)[1] as she lay moored at the Balboa Docks, Panama, Canal Zone (Finding 14, 60a). The explosion killed a chemist employed by the Canal Zone Government, and four longshoremen. It also injured several other longshoremen and caused the petitioner to be severely burned (Finding 24, 63a).

Petitioner, a fireman employed by the Canal Zone Fire Department, was on board the vessel as a fire watchman (Finding 17, 61a) because of a fire which had broken out on the vessel earlier that day at about 12:45 A. M. (Finding 3, 10a) and which was considered extinguished at about 8:00 A. M. (Finding 7, 57a).

A. The Conceded Negligence of the Respondent In Causing the Fire.

Feb. 6, 1954—12:20-12:45 A. M.: The M S Lisholt was tied up at Dock 6 and light diesel oil was being pumped from full tanks ashore through hoses into one of the ves-

[1] Numbers are to pages of Transcript of Proceedings, pp. 1-298. Numbers followed by "a" refer to Appendix to Appellant's Brief, pp. 1a-53a, and Appendix to Respondent's Brief, pp. 54a-80a in the Court of Appeals.